UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

MIDMICHIGAN GLADWIN PINES

Employer

and **Case 7-RC-22625**

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (USW), AFL-CIO[1]

Petitioner

APPEARANCES:
Robert W. Sikkel, Attorney of Grand Rapids, Michigan, and
Jonathan P. Kok, Attorney, of Holland Michigan, for the Employer
William L. Laney, Jr., Lead Organizer, of Bay City, Michigan, for the Petitioner, and
Richard G. Mack, Jr., Attorney, of Detroit, Michigan, on briefs

SUPPLEMENTAL DECISION ON REMAND AND ORDER TO COUNT IMPOUNDED BALLOTS

Background

On March 19, 2004, I issued a Decision and Direction of Election (DDE) in this matter, in which I found that, *inter alia*, the full-time, regular part-time, and casual/on-call registered nurses (RNs) and licensed practical nurses (LPNs) were not supervisors within the meaning of Section 2(11) of the Act. I determined that the RNs and LPNs (nurses) did not have independent authority to hire, promote, demote, lay off, recall, reward, or discharge the 70 to 75 nursing assistants or CENAs at the facility. I also found that the nurses' role in assigning and directing the work of, and calling in, CENAs did not support a finding of supervisory status.

[1] Subsequent to the filing of this petition, the original Petitioner, United Steelworkers of America, AFL-CIO, merged with other labor organizations to form the current Petitioner.

I directed an election following the Board's dictates of ***Sonotone Corp.***, 90 NLRB 1236 (1950). I determined that if a majority of the RNs voted for inclusion in a unit with the LPNs, the following would constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time, and casual/on-call registered nurses and licensed practical nurses employed by the Employer at its Gladwin, Michigan facility; but excluding CENAs and all other employees represented by a labor organization, guards and supervisors as defined in the Act, and all other employees.[2]

If a majority of the RNs did not vote for inclusion in the unit with the LPNs, I found the following two groups of employees would constitute separate units appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Unit A

> All full-time, regular part-time, and casual/on-call licensed practical nurses employed by the Employer at its Gladwin, Michigan facility; but excluding registered nurses, CENAs and all other employees represented by a labor organization, guards and supervisors as defined in the Act, and all other employees.

Unit B

> All full-time, regular part-time, and casual/on-call registered nurses employed by the Employer at its Gladwin, Michigan facility; but excluding licensed practical nurses, CENAS and all other employees represented by a labor organization, guards and supervisors as defined in the Act, and all other employees.

The Employer filed a request for review of my DDE on April 4, 2004. The sole issue involved the nurses' status as supervisors. The election was held on April 14, 2004, and the ballots were impounded. The Board granted the Employer's request for review on April 20, 2004.

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[2] With regard to the casual/on-call RNs and LPNs, the record did not set forth the number of hours they worked or the regularity of their work schedules. For on-call employees who work on a regular basis, the Board utilizes the eligibility formula set forth in ***Davison-Paxon Co***, 185 NLRB 21 (1970), and ***Sisters of Mercy Health Corp.***, 298 NLRB 483 (1990). Accordingly, I found that casual/on-call RNs and LPNs were eligible to vote in the election if they regularly averaged four hours or more of work per week during the quarter immediately prior to the eligibility date. The parties agreed to this eligibility formula and these employees were permitted to vote under challenge. There was no request for review on this issue.

On September 30, 2006, this case was remanded by the Board for further appropriate action consistent with the Board's decisions of September 29, 2006 in ***Oakwood Healthcare Inc***., 348 NLRB No. 37, ***Croft Metals***, 348 NLRB No. 38, and ***Golden Crest Healthcare Center***, 348 NLRB No. 39. On October 19, I issued an Order to Show Cause why the record in this matter should be reopened for the purpose of receiving additional evidence regarding the authority of the nurses to assign, responsibly direct, and exercise independent judgment within the meaning of Section 2(11), including potential changed circumstances bearing on their status. Both the Employer and the Petitioner responded by letters dated November 9 and stated that the record should not be re-opened. On November 22, after reviewing the existing record and the positions of the parties, I issued an Order Setting Date for Filing Briefs. I held that the record would not be reopened and invited the parties to file supplemental briefs, if they so desired, by December 6. Upon request of the Employer, I extended the deadline to December 13. Both briefs were received and have been carefully considered.[3]

Having considered the record, the prior DDE, and the supplemental briefs, and applying the standards set forth in ***Oakwood Healthcare***, I again find that the Employer has not satisfied its burden of proof that the nurses are statutory supervisors.

Overview

My findings regarding the Employer's operations, and the functions and duties of its employees are set forth in the DDE, pages 3-8. Relevant aspects of those findings will be reiterated and expanded upon here.

The Employer operates a 120 bed, state-licensed nursing home/long-term care facility. Administrator Jeffrey Erhard is the facility manager. Mary Stewart is the director of nursing (DON). Nursing management also includes Jean Cameron, assistant director of nursing (ADON), and restorative RNs Sara Sisco and Cynthia Esiline. Also within the department is Minimum Data Set (MDS) Coordinator Sara Seafross, MDS Nurse Susan Bancroft, and Staffing Coordinator Chris Strunk.

The facility has six residential hallways. There are three nurses' stations responsible for the six hallways. They are each staffed by one or two nurses. Occasionally, the DON or ADON works at the three stations, as may physicians, physical therapists, and/or the MSD nurse. Nurses work either 12-hour shifts, 6:00 a.m. to 6:00 p.m. or 6:00 p.m. to 6:00 a.m., or 8-hour shifts, 6:00 a.m. to 2:00

[3] Petitioner's supplemental brief arrived by courier on December 13 at 4:47 p.m., two minutes after the Regional Office normally closes. As the door remained opened at that time, I have considered that brief.

p.m., 2:00 p.m. to 10:00 p.m., or 10:00 p.m. to 6:00 a.m. Each hallway is also staffed by CENAs. They work 8-hour shifts. During the 6:00 a.m. to 2 p.m. shift, 13 to 16 CENAs are scheduled. From 2:00 to 10:00 p.m., there are 11 or 12 CENAs scheduled. From 10 p.m. to 6 a.m., 8 to 12 CENAs are scheduled. The CENAs have been subject to a series of collective bargaining agreements between the Employer and Petitioner for many years.

From approximately 6:00 p.m. until 8:00 a.m., there usually are no managers on the premises. However, during their off-hours, Administrator Ehrhardt, DON Stewad and ADON Cameron are always on-call for nurses by home phone, cellular phone, and pager should a situation arise where they need to be contacted.

Residents' Care

Care plans are developed for residents upon their admittance. They contain protocols and directives regarding their treatment. A care plan is made up by an interdisciplinary team comprised of the DON, ADON, the MDS coordinator, MDS nurse, activity director, dietician, ward clerk, and social services staff. There are no RNS or LPNs on the interdisciplinary team, although the team does receive reports from them. A care plan may contain ambulation requirements if the resident is on an active restorative program, i.e., the care plan may state that residents should be ambulated to and from the dining room.

The DON also generates standing orders that govern care for a variety of residents' conditions, including respiratory distress, headache pain, indigestion, skin tears, vital signs, weights, supplements, and lab tests. For example, if a resident is on tube feed or an IV, the standing orders require that a patient's "Intake and Output" be monitored. Intake is monitoring the amount of fluid a resident consumes in a day and the output is the urinary output for the day. Newly admitted residents also have their intake and output monitored. Vital signs are taken when a resident is newly admitted or showered pursuant to the standing orders. The standing orders require a physician's authorization.

In addition, if the dietician is concerned that a resident's intake is not adequate, the DON writes notes to the nurses and draws their attention to relevant lab reports. The dietician also determines which residents are to receive nutritional supplements. The restorative nurse determines how often a resident should be ambulated, and this information is recorded in a gray book. Reports also are issued when a resident has difficulties concerning bowel movements. These are reviewed by the nurses. Nurses also must consult a gray notebook to determine which residents have requested showers. An additional report available to the nurses carries the names of other residents who are to be showered.

It is the nurses' responsibility to transfer the information from a resident's care plan, the standing orders, the gray notebook containing the shower and ambulation instructions, and the DON's notes to a CENA worksheet which contains six sections: "Showers," "Vital Signs," "Supplements," "Ambulation," "BM List," and "Intake and Ouput." If a nurse has newly admitted patients, patients on antibiotics, medicare patients, or patients whose status has otherwise changed, the nurse adds this information to the worksheet. The nurse also writes when he or she has determined that vital signs should be taken because a resident appears to be ill, or in anticipation of a visit from a physician. The nurse records on the worksheet when a resident needs to be X-rayed, or if a resident will be leaving the facility for a short time. The nurses assign CENAs to take residents to the hospital and to assist with repositioning residents.

Scheduling: Time and Location

Staffing Coordinator Chris Strunk posts a two-week schedule for the CENA's indicating which days and shifts the CENAs work as well as their break and lunch times. Strunk also assigns CENAs to a hallway. If a CENA is on restricted duty, Strunk assigns the CENA to particular tasks. Strunk also assigns new CENAs to a more experienced CENA for job training. With recommendations from the ADON, Strunk assigns the nurses to hallways and to their scheduled days and shifts.

CENAs perform their work from their worksheets. There is a space on the top of the CENA worksheet for the nurse to write down which rooms a CENA is to work in the hallway. However, nurses cannot complete the worksheet until they accept reports on residents from the nurses who are leaving their shifts. Nurses cannot come in before their shift to complete their worksheets, and at least one nurse has been threatened with discipline for doing so. As a result, the record indicates nurses usually are not able to complete the CENA worksheets, including room assignments, prior to the beginning of the CENAs' shifts. If the worksheets are not completed, CENAs start their tasks and work together collectively. If the CENAs pass water to the residents, for example, they pass it to all the residents on the hallway until the task is completed. Similarly, CENAs take residents to breakfast without consulting their worksheet, if it is not available. At least one nurse has completed the worksheets only 25 percent of the time.

In assigning rooms, nurses may pair heavier residents with the stronger CENAs, and a CENA's compatibility with a resident may also be a factor. However, one nurse testified that she randomly divides the rooms among the CENAs. With 18 residents and 3 CENAS on a hallway, she simply assigns each CENA 6 residents. In addition, some hallways require only one CENA for all the residents. Further, one nurse testified that regardless of the room assignments, she

does not expect that a CENA is responsible only for rooms to which she is assigned. Her concern is that CENAs would not respond to a resident's call light or to an alarm triggered by a wandering resident if that resident has not been assigned to the CENA.

The DON acknowledged that nurses may assign CENAs to groups of rooms based on the rooms' proximity to each other, indicating that a resident's needs are not closely correlated with a CENA's skills. In that regard, nurses are not always familiar with the CENAs' work because the scheduling coordinator does not always assign CENAs to the same hallways. Nurses watch the CENAs when they can. However, they may not have an opportunity to observe a CENA's interaction with residents as the nurses are busy with nursing tasks. The DON's testimony that care varies in difficulty from room to room is undercut by a nurse's testimony that if one resident is much more difficult to take care of then the others, it just means the CENAs have to work together. For example, nine out of nineteen residents on one hallway could not be showered by one CENA as they were too injured, scared or combative. Two to three CENAs might be required to shower these residents and to ambulate them.

The location of CENAs' assignments may be adjusted when a CENA goes home ill or calls off work. There is usually enough staffing so that the facility can accommodate CENAs who call off work without calling in additional staff or holding staff over. Managers have predetermined which hallways have priority for CENAs when staffing is short. Adjusting assignments requires a determination as to which hallway can function with less than optimal staffing, depending on the acuity of the residents or other issues in the unit. Staffing coordinator Strunk has the authority to move staff around on her own. Nurses may perform these adjustments in conjunction with the DON, ADON, and the staffing coordinator if these managers are in the facility. If not, the nurses talk among themselves and can decide to move CENAs to different hallways. If there is a disagreement between the nurses on staffing adjustments, the nurses call either the DON or ADON for assistance in resolving the dispute. A replacement for a CENA might be an RN or LPN who is not working at a nurse station.

The collective bargaining agreement for CENAs contains detailed provisions regarding when overtime is to be worked. It includes the directive that overtime is to be worked if: 1) call-ins have resulted in staffing below the number required by the Michigan Department of Consumer and Industry services, or less than acceptable staff numbers to provide quality care to residents; 2) weather conditions prohibit adequate staff from reporting to work; or 3) an emergency situation requires additional staffing. When a staff member needs to be called into work, nurses consult a list previously compiled by Strunk of individuals to be called in. The collective bargaining agreement covering CENAs provides that this

additional work will be offered to part-time, regular part-time, and full-time CENAs, in that order, who have indicated, in writing, an interest in working additional hours. The contract provides that if management is not able to call in needed staff, the outgoing shift must remain. If that occurs, the staff members with the least seniority are required to stay until relieved unless a more senior employee requests overtime. The contract further provides that employees at work cannot refuse such work assignments unless they would incur serious inconvenience or economic loss. The record does not establish that the Employer deviates from this practice. If a CENA is held over, a nurse signs a "Request for Payment of Extra/Overtime Worked" to verify that the CENA has worked overtime hours. The nurse has no further involvement with approving or disapproving overtime other than signing the form.

Overseeing the Work of CENAs

If a CENA is observed improperly conducting procedures, the nurse stops the CENA to avoid harm to residents. Examples include emptying a Foley catheter without using alcohol wipes or transferring a resident in the wrong way. The nurses also make rounds and check to make sure that the CENAs get the residents up and to the dining room for their meals or that they are fed in their rooms, that residents are ambulated, and that they participate in activities.

Nurses have the responsibility to tell CENAs to complete their tasks. If a nurse feels that CENAs are not providing adequate care, the nurse reports this to the DON or ADON, who handles the incident without further involvement from the nurse. If a CENA is not working, the nurse reports that to management, but does not have to direct the CENA to get back to work. CENAs report to the nurses when they go on break or lunch. Similarly, nurses alert CENAs on their hallway when the nurses take a break or go to lunch.

If a CENA does not complete a task, it is the CENA who is disciplined. There is no evidence that nurses are disciplined if a CENA on their hallway does not complete a task or engages in other misconduct. At a staff meeting, the DON told nurses to make sure that CENAs were completing the job assignments that were given to them and noted that CENAs had not always been shaving residents or giving them baths. Yet, nurses were not disciplined for failing to make sure CENAs did so. When CENAs complete their tasks, they are required to indicate this on the worksheet. Discipline is not issued to a nurse for the CENA's failure to properly document her or his tasks.

The Employer's nurse evaluation form includes a section with the category titled "Supervisory Role" which compromises 15% of the evaluation. The category includes sections on "supervision of the CENAs at all times," "complete

work assignments for CENAs," "regular round of your assigned unit to ensure CENAs is [sic] completing work assignments," and "monitoring to assure that residents are clean and appropriately dressed." Nurses whom the parties stipulated are not supervisors are evaluated with this same form. Evaluations issued to two nurses downgraded the nurses three percent and two percent, respectively, under the item "Supervisory Role." The evaluations contained handwritten notes directing the nurses to make sure that CENAs were completing BM records, and to know where CENAs are and ensure that they are working. However, there is no evidence that any actions, positive or negative, were taken as a result of these evaluations.

Analysis

Section 2(3) of the Act excludes from the definition of the term "employee" "any individual employed as a supervisor." Section 2(11) of the Act defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Individuals are "statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions Section 2(11), 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer." ***Kentucky River Community Care***, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. The Board has reaffirmed that the burden to prove supervisory authority is on the party asserting it. ***Oakwood Healthcare, Inc***., 348 NLRB No. 37, slip op. at 9, citing ***Dean & Deluca New York, Inc.***, 338 NLRB 1046, 1047 (2003); accord ***Kentucky River***, 532 U.S. at 711-712. The party seeking to prove supervisory status must establish it by a preponderance of the evidence. ***Oakwood Healthcare***, supra, citing ***Dean & Deluca***, 338 NLRB at 1047; ***Bethany Medical Center***, 328 NLRB 1094, 1103 (1999). In addition, the Board's long recognition that purely conclusionary evidence is not sufficient to establish supervisory status is still viable. The Board requires evidence that the individual actually possesses supervisory authority. ***Golden Crest Healthcare Center***, 348 NLRB No. 39, slip op. at 5.

Responsible Direction

In ***Oakwood Healthcare,*** supra, the Board found that for direction to be "responsible," the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. ***Id.***, slip op. at 7. Here, nurses have the authority to instruct a CENA to perform a task and to perform it properly. However, they do not have the authority to discipline the CENAs if they do not perform their tasks. That is left to the DON or ADON. Moreover, nurses are not disciplined when the CENAs on their hallways fail to do their tasks or complete the required documentation. Although the DON at a staff meeting directed nurses to ensure that the CENAs performed their tasks, the nurses were neither advised that they would be subject to disciplinary actions, nor disciplined because CENAs did not perform these tasks.

The Employer emphasizes that two nurse evaluations show that the nurses were downgraded and thus held accountable for CENAs' actions. However, with regard to these evaluations, the Employer has not shown that "material consequences might result from . . .[the nurses'] . . . performance in directing" CENAs. ***Golden Crest***, supra, slip op. at 5. Although the evaluation form rates the nurses on various performance factors arising out of their direction of CENA work, there is no evidence that any action, either positive or negative, has been or might be taken against nurses as a result of their rating in those performance factors, or that any nurse has been advised by the Employer that adverse action might result from a negative rating in those performance factors. ***Id***. Under such circumstances, the Employer has shown, at most, nothing more than "paper" accountability, rather than the "actual" accountability required. ***Id***.

Thus, the Employer's reliance on the nurse evaluations forms is not sufficient to establish their accountability for CENAs' work performance. The Employer has not met its burden in establishing that nurses responsibly direct CENAs.

Assignment of work

The Board in ***Oakwood Healthcare*** defined assigning work as "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." ***Id***., slip op. at 4.

Time

The record establishes that the CENAs' scheduled hours are determined by the staffing coordinator, Chris Strunk. Strunk assigns CENAs their break and lunch times. The nurses do not schedule CENAs' work hours. If the facility is short-staffed due to CENAs calling off, the nurses, often with consultation with management, can call in CENAs or ask CENAs to work overtime. Strunk provides a list of individuals to be called, and the CENA collective bargaining agreement governs the order in which individuals are called in or selected for overtime.

Thus, nurses have no role in scheduling CENAs to their original work schedules. If schedules must be altered, the nurses' limited roles in calling in CENAs to work or holding them for overtime are circumscribed by management and the CENAs' collective bargaining agreement. The Board in ***Golden Crest*** distinguished between a nurse "requesting" that staff come in and "requiring" them to do so. Because there was no evidence that the nurses could require certified nursing assistants to come in, the Board found the employer had not established the exercise of supervisory authority. ***Id***., slip op. at 4. The same is true here.

Place and Tasks

In ***Oakwood Healthcare***, the Board found that emergency room charge nurses designated nursing staff to geographic areas within the emergency room. The Board found that this assignment of nursing staff to specific geographic locations within the emergency room fell within the definition of "assign" for purposes of Section 2(11). ***Id.***, slip op. at 10. In the instant case, the nurses also assign CENAs to geographic areas or rooms within the hallways where the CENAs work, although there are times when such room assignments are not made or are made randomly. Nonetheless, as with the emergency room nurses in ***Oakwood Healthcare***, the nurses do assign CENAs to work in specific locations. Thus, the nurses possess one of the supervisory functions of Section 2(11). The next step, discussed later, is to determine whether the nurses exercise independent judgment in making these assignments.

Once CENAs are assigned to rooms, their daily tasks are largely defined by the care plans and standing orders generated by management and which are merely transcribed by the nurses. Nurses do tell CENAs when residents need special care, such as transport to a physician. They may write such special instructions on the CENA worksheets. However, the nurses' assignment of these "discrete task[s]" is closer to the "ad hoc assignments" described in ***Croft Metals***, 348 NLRB No. 38, slip op. at 6. In that case, the Board found that the lead

persons switching tasks among employees assigned to their line or department was insufficient to confer supervisory status. ***Id.*** Here, the nurses' assignments of discrete tasks to CENAs do not confer them with supervisory status.

Independent Judgment

In ***Oakwood Healthcare,*** the Board, consistent with ***Kentucky River***, adopted an interpretation of "independent judgment" that applies to any supervisory function at issue "without regard to whether the judgment is exercised using professional or technical expertise." The Board explained that "professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." ***Id***., slip op. at 7. The Board then set forth standards governing whether the exercise of the Section 2(11) acts are carried out with independent judgment: "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." ***Id.***, slip op. at 8. The Board found that the relevant test for supervisory status utilizing independent judgment is that "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data". ***Id***. Further, the judgment must involve a degree of discretion that rises above the "routine or clerical". ***Id***.

Having found that the nurses assign CENAs to a location, I now examine whether they do so using independent judgment. In ***Oakwood Healthcare***, the Board found that the term "assign" encompassed a charge nurse's responsibility to assign nurses and aides to particular patients. ***Id.*** slip op. at 4. The Board found that "if the registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse's assignment involves the exercise of independent judgment." ***Id.*** The Board found that the charge nurses who worked outside of the emergency room used independent judgment in matching patients and nursing staff. For example, nurses who were proficient in administering dialysis were assigned to a kidney patient. The charge nurse assigned staff with skills in chemotherapy, orthopedic or pediatrics to the patients with needs in those areas. Charge nurses also assigned the nursing personnel to the same resident to ensure continuity of care. The nurses who were assisting a resident with a blood transfusion were not assigned to other ill patients. Charge nurses determined whether a mental health nurse or an RN should be assigned a psychiatric patient. ***Id.***, slip op. at 12.

In contrast, the Board found that the emergency room charge nurses did not "take into account patient acuity or nursing skill in making patient care assignments." The evidence did not show "discretion to choose between

meaningful choices on the part of the charge nurses in the emergency room." ***Id.*** slip. op. at 13. In the instant case, the Employer has not shown that the nurses perform a detailed analysis of CENAs' abilities and residents' needs in making overall patient assignments to CENAs. In ***Oakwood Healthcare***, the charge nurses outside the emergency room were making assignments to nurses, in addition to nursing assistants and other employees. Nurses have greater training and skills than CENAs. Here, there is no showing that CENAs have different training or skills in different medical areas or that residents are consistently assigned to the same CENAs. In fact, a nurse testified that she was not always familiar with the capabilities of the CENAs on her shift as the scheduling coordinator does not always assign the same CENAs to her hallways. Moreover, while a stronger CENA might be assigned a heavier resident and the nurse may take a CENA's affinity to a particular resident into account, the CENAs' work assignments are fluid and extend to residents who are outside of their room assignment when other residents are in distress or when CENAs work in teams to shower or ambulate residents. In addition, when nurses do not have sufficient time to complete the room assignments at the beginning of the CENAs' shifts, the CENAs cooperate in carrying out their tasks for all the residents in their hallway by distributing water or wheeling residents to the dining room.

The nurses in the instant case are similar to the emergency room charge nurses in ***Oakwood***, who simply assigned nursing staff to a geographic area without regard to matching the needs of the patients with the skills of the nursing staff. Thus, the Employer has not sustained its burden in showing that the nurses' role making location assignments necessitates the exercise of independent judgment.

I earlier found that nurses do not assign by giving significant overall duties to CENAs or appointing them to a time. I further conclude that, even if they do so, they do not exercise independent judgment in such assignments. As noted, the CENAs' overall tasks are largely defined by the care plans and standing orders generated by management, not the nurses. Thus, in the spectrum set out by the Board, the nurses' assignment of tasks falls closer to a "completely controlled" action than "free actions." They do not involve a "degree of discretion that rises above the routine or clerical. ***Id.***, slip op. at 8. Thus, the assignment of tasks does not require the use of independent judgment.

Concerning the nurses' assignments of CENAs to particular "times" of work, the Board held in ***Oakwood Healthcare*** that "the mere existence of company polices does not eliminate independent judgment from decision-making if the policies allow for discretionary choices;" but that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policy or rules, the verbal instructions of higher authority, or in the

provisions of a collective bargaining agreement." ***Id.*** The initial scheduling, performed by Chris Strunk, involves no choice at all on the nurses' part. In addition, the collective bargaining agreement does not allow for choices by the nurses with regard to calling in CENAs to work. The collective bargaining agreement is sufficiently detailed with regard to calling in employees or holding them for overtime that the nurse's limited roll in making the calls does not constitute a "discretionary choice." It does not require the use of independent judgment.

Conclusion

I find that the nurses do not responsibly direct CENAs. I further find that the Employer has established that the nurses make assignments regarding the work locations for CENAs, but the nurses do not use independent judgment in doing so. Finally, I find that the nurses do not make assignments regarding the duties that CENAs perform or the times that they work, and that, if they do make such assignments, they do not exercise independent judgment in doing so.

Based on the original decision, the foregoing, and the record as a whole, I reaffirm the conclusion that the RNs and LPNs are not supervisors reached in my prior decision in directing an election among the petitioned-for employees. Accordingly, **IT IS ORDERED** that the ballots cast on April 14, 2004, and impounded, be counted to ascertain the desires of the nurses as to representation in the petitioned-for unit(s), and that thereafter an appropriate certification(s) issue.[4]

Dated at Detroit, Michigan, this 8th day of January 2007

"/s/[Stephen M. Glasser]."

(SEAL) /s/ Stephen M. Glasser

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[4] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570**. This request must be received by the Board in Washington by **January 22, 2007**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at **www.nlrb.gov**. On the home page of the website, select the E-Gov tab and click on E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-Filing instructions explaining how to file the documents electronically will be displayed.